Supreme Court, U.S.
FILED
MAY 12 1998
OFFICE OF THE CLERK

Nos. 97-1683 and 97-1697

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

In Re:

PINTLAR CORPORATION and GULF USA CORPORATION,

Debtors.

DAVID J. ROWLAND, JEREMY E. JAMES, DAVID L. HUDD and DEREK J. MORAN,

Petitioners,

—v.—

BERNARD GOODSON, FORD ELSAESSER, LOWELL FINLEY and JAY J. MILLER, as Trustees

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

RICHARD W. REINTHALER*
JANIS M. MEYER
RICHARD B. SYPHER
DIANNE COFFINO
BRETT T. GOODMAN
DEWEY BALLANTINE LLP
1301 AVENUE OF THE AMERICAS
NEW YORK, NEW YORK 10019-6092
(212) 259-8000

TERRY L. MYERS
RAMONA S. NEAL
GIVENS PURSLEY LLP
SUITE 200, PARK PLACE
277 NORTH SIXTH STREET
BOISE, IDAHO 83701
(208) 342-6571

* Counsel of Record

Attorneys for Respondents Bernard Goodson, Ford Elsaesser, Lowell Finley and Jay J. Miller, as Trustees

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

COUNTER-STATEMENT OF QUESTION PRESENTED 1

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT 1

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI FOR RESPONDENTS BERNARD GOODSON, FORD ELSAESSER, LOWELL FINLEY AND JAY J. MILLER, AS TRUSTEES 2

STATEMENT OF THE CASE 2

A. Overview 2

B. The Decisions Below 5

1. The Bankruptcy Court 5

2. The District Court 7

3. The Court of Appeals 8

REASONS FOR DENYING THE PETITIONS 10

A. The Decision Below Is Not Contrary To Supreme Court Precedent And Does Not Present A Conflict Among The Circuits Requiring This Court's Attention 10

B. The Question Presented To This Court By Petitioners Is Not Crucial To The Ultimate Disposition Of This Case, As There Exist Several Separate Non-Constitutional Grounds Upon Which The Same Result Can Be Reached 11

C. This Court Is Not In The Practice Of Reviewing Appellate Decisions Where The Alleged Defect Occurred With Respect To A Finding Of Fact 13

D. The Court Of Appeals Did Not Abuse Its Discretion In Determining That It Was "Just and Practicable" To Apply Revised Bankruptcy Rule 7004(f) To This Pending Case 13

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

Cases

Arrowhead Estates Dev. Co. v. United States Trustee (In re Arrowhead Estates Dev. Co.), 42 F.3d 1306 (9th Cir. 1994) 15

Barr v. Matteo, 355 U.S. 171 (1957) 12

Branti v. Finkel, 445 U.S. 507 (1980) 13

Inoco Plc and Others v. Gulf USA Corp., 1995 I No. 781, Court of Appeal (Eng.), Jan. 22, 1997 12

Landgraf v. USA Film Prods., 511 U.S. 244 (1994) 9, 15

McCray v. New York, 461 U.S. 961 (1983) 11

McGee v. International Life Ins. Co., 355 U.S. 220 (1957) 9

Nycal Corp. v. Inoco, Plc., 96 Civ. 7159, 1997 WL 774683 (S.D.N.Y. Dec. 12, 1997) 5

Republic Nat'l Bank v. United States, 506 U.S. 80 (1992) 16

Rogers v. Lodge, 458 U.S. 613 (1982) 13

Ross v. Moffitt, 417 U.S. 600 (1974) 10

United States v. Johnston, 268 U.S. 220 (1925) 13

Other Authorities

10 Lawrence P. King, *Collier on Bankruptcy* (15th ed. rev. 1996) 14

Rules

Fed. R. Bankr. P. 7004(f) ..... passim

Fed. R. Civ. P. 4 ..... 4, 14

Fed. R. Civ. P. 4(k)(2) 14

COUNTER-STATEMENT OF QUESTION PRESENTED

Should *certiorari* be granted in order to determine whether the Court of Appeals *abused its discretion* in finding -- in the words of this Court's Order adopting revised Bankruptcy Rule 7004(f) -- that it was "just and practicable" to apply the revised rule to this action in order to determine whether personal jurisdiction existed over Petitioners, particularly where, as here:

- the Court of Appeals' decision is not contrary to Supreme Court precedent and does not present a conflict among the circuits;

- the question presented is not crucial to the ultimate disposition of the case, as there exist several other non-constitutional grounds upon which the decisions below can be affirmed; and

- Petitioners face no substantive consequences as the result of what Petitioners erroneously contend is a "retroactive" application of a rule that in any event supplies only an additional basis for upholding jurisdiction over them.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Respondents Bernard Goodson, Ford Elsaesser, Lowell Finley and Jay J. Miller are the trustees of a litigation trust established under the laws of, and resident in, the State of Idaho. (A 63a.) The litigation trust was formed for the purpose of prosecuting the claims asserted in an amended complaint filed in the United States Bankruptcy Court for the District of Idaho on November 30, 1994, on behalf and for the benefit of substantially all of the unsecured creditors of Gulf USA Corporation and its wholly owned subsidiary, Pintlar Corporation, reorganized debtors. (A 36a-37a, 39a.) None of the Respondents, nor the litigation trust, has any parent or subsidiary companies.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI FOR RESPONDENTS BERNARD GOODSON, FORD ELSAESSER, LOWELL FINLEY AND JAY J. MILLER, AS TRUSTEES

Respondents Bernard Goodson, Ford Elsaesser, Lowell Finley and Jay J. Miller (the "Trustees") respectfully request that this Court deny the petitions for writs of *certiorari* filed by David J. Rowland, Jeremy E. James, David L. Hudd and Derek J. Moran (the "Rowland Directors") and Inoco Plc ("Inoco," and, together with the Rowland Directors, "Petitioners"), which seek review of the decision of the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

Pursuant to Rule 15.1 of the Rules of this Court, the Trustees provide the following statement of the case to correct the misstatements contained in the petitions filed by the Rowland Directors and Inoco.

A. Overview

In 1989, Petitioners -- foreign investors with a prior track record of engaging in speculative investments for the primary purpose of enriching themselves at the expense of others -- seized control of Gulf USA Corporation ("Gulf"),[1] formerly known as Gulf Resources and Chemical Corporation, an insolvent natural resources company that had, through liquidation of its principal business units, amassed $177 million in cash reserves.[2] (A 36a-37a.) These funds could (and should)

---

[1] Gulf and its wholly owned subsidiary, Pintlar Corporation ("Pintlar"), together are referred to herein as "Gulf" or the "Company."

[2] Technically, a wholly owned subsidiary of Inoco named Downshire, N.V., purchased a 34 percent stake in Gulf. At the time of the purchase, Rowland held a controlling interest in Inoco through his family trust, and Rowland, along with Hudd, James and Moran, were officers of Inoco. (A 36a.)

continued on the following page...

have been used to satisfy substantial obligations relating to remedial and natural resource damages owed to the United States Environmental Protection Agency (the "EPA"), the Coeur d'Alene Indian Tribe and other environmental creditors,[3] pension and medical benefits to Pintlar's retirees, and bond-related and other debt owed to Gulf's creditors, located primarily in Idaho. (A 36a-37a, 86a.) Instead, as the amended complaint alleges, Petitioners systematically bled Gulf dry, removing assets from the United States (and away from creditors), committing millions of dollars to precarious or fraudulent stock trades, engaging in risk-laden real estate transactions halfway around the world, and lining their own pockets with the Company's money. (A 37a-39a, 87a-100a.) Over a 27-month span, Petitioners succeeded in reducing Gulf's cash reserves by more than $125 million before selling their interest in the Company and fleeing the United States. Id. Within two years, Gulf's bankruptcy ensued,[4] leading to the formation of the litigation trust and the commencement of this action, which seeks redress for the massive losses suffered by the Company's creditors. (A 39a.)

As the United States Bankruptcy Court for the District of Idaho correctly concluded (A 140a-146a) -- and as two appellate courts have acknowledged -- *there is no jurisdiction in the world better suited than the District of Idaho* to adjudicate the claims

---

...*continued from the preceding page*

Upon the closing of the purchase, all four individuals also became officers and directors of Gulf as well. (A 37a.)

[3] In 1984, the EPA named Gulf as a potentially responsible party for the extensive environmental damage that had occurred at the Bunker Hill mining site (the "Bunker Hill Site") in Idaho -- one of *the* largest, if not the largest, SuperFund sites in the country -- during the period in which Pintlar owned and operated the site. (A 36a, 85a-86a.)

[4] In the Company's bankruptcy proceedings, its unsecured creditors submitted proofs of claims -- all of which were ultimately approved -- in excess of $1.6 *billion*.

asserted in this adversary proceeding. The victims of Petitioners' wrongdoing were principally located in Idaho; Petitioners' conduct was purposefully directed at Idaho; and Idaho suffered by far the greatest financial impact of Petitioners' fraudulent scheme. (A 54a-55a.)

Both the Bankruptcy Court and the District Court held that jurisdiction over Petitioners existed under Idaho's long-arm statute. The Court of Appeals recognized, however, that the exercise of jurisdiction here may be predicated on federal law without reference to the Idaho long-arm statute. This is because of revised Bankruptcy Rule 7004(f). On December 1, 1996, during the pendency of the instant action, Bankruptcy Rule 7004(f) was revised to make clear that bankruptcy courts may exercise jurisdiction over foreign defendants, such as Petitioners, provided that the exercise of jurisdiction comports with due process.[5] In such cases -- where federal law supplies the basis for personal jurisdiction and authorizes worldwide service of process -- due process is satisfied when defendants are shown to have sufficient aggregate contacts with the United States as a whole, not just with any particular state. In its Order adopting the revisions to the Bankruptcy Rules, this Court expressly stated that revised Bankruptcy Rule 7004(f) may be applied to pending cases such as the instant action "insofar as just and practicable." (A 181a.) Thus, where, as here, Petitioners have sufficient aggregate contacts with the United States, the exercise of

---

[5] In relevant part, revised Bankruptcy Rule 7004(f) states:

> If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons . . . in accordance with this rule or the subdivisions of Rule 4 F.R.Civ.P. made applicable by these rules is effective to establish personal jurisdiction over the person of any defendant with respect to a case under the Code or a civil proceeding arising under the Code, or arising in or related to a case under the Code.

(A 177a-178a.)

jurisdiction under revised Bankruptcy Rule 7004(f) comports with due process.

B. The Decisions Below

On November 30, 1994, an amended complaint (the "Complaint") was filed in the Bankruptcy Court against certain of Gulf's former officers and directors and their affiliated corporate entities, including Petitioners.[6] As a basis of recovery against Petitioners, the Complaint asserted various legal theories arising out of Petitioners' scheme, including, without limitation, fraudulent conveyance, civil conspiracy, breach of fiduciary duty, corporate waste, mismanagement, misrepresentation and breach of contract.[7] (A 6a.)

1. The Bankruptcy Court

In early 1995, Petitioners moved to dismiss the Complaint for lack of personal jurisdiction and insufficiency of service. (A 83a.) On September 29, 1995, the Bankruptcy Court held that

---

[6] Petitioners mislead this Court when they contend that the Ninth Circuit's decision revived claims that would otherwise be barred under the applicable statute of limitations. Rowland Directors' Petition (the "RD Petition") at 7; *see also* Inoco Petition at 15. The statute of limitations was tolled upon the timely filing of the original complaint on January 27, 1994 and continues to be tolled during the pendency of this action against Petitioners.

[7] In a misleading attempt to convince this Court that they have been absolved of all liability, Petitioners note that a different release they received from another entity at the same time they received a release from the Company has been upheld by a different judge in a different jurisdiction in an unrelated case in which neither Gulf nor the Trustees were parties. RD Petition at 8 n.5 (citing *Nycal Corp. v. Inoco, Plc.*, 96 Civ. 7159, 1997 WL 774683 (S.D.N.Y. Dec. 12, 1997)). The release in issue in this case was never before that court. Petitioners also ignore the crucial differences between that litigation and this one. Here, the Trustees have maintained from the outset of this case that the "release" purportedly granted by the Company to Petitioners was voidable as a fraudulent conveyance and, in any event, could (and did) not release claims held by creditors, two arguments that were unavailable to the releasing party in the *Nycal Corp. v. Inoco, Plc.* case.

the Trustees had satisfied their *prima facie* burden[8] of establishing that the Petitioners were subject to personal jurisdiction under the Idaho long-arm statute. (A 114a-124a.) The Bankruptcy Court held that personal jurisdiction existed over Rowland and Hudd for the fraudulent transfer, misrepresentation and civil conspiracy counts in the Complaint because, in furtherance of their scheme to loot Gulf, they made misrepresentations in Idaho and performed out-of-state acts causing injury in Idaho. (A 120a.) The Bankruptcy Court also held that James, Moran and Inoco were subject to personal jurisdiction in Idaho for the fraudulent transfer, misrepresentation and civil conspiracy counts of the Complaint because any misrepresentations made by Rowland and Hudd were attributable to them as co-conspirators. (A 122a-124a.) The Bankruptcy Court also concluded that the exercise of personal jurisdiction over Petitioners under the Idaho long-arm statute accorded with due process based on Petitioners' aggregate contacts with the United States. (A 136a-137a.)[9]

---

[8] Because no discovery was taken and no evidentiary hearing was held, the Bankruptcy Court correctly concluded that the Trustees were required to make only a *prima facie* showing of the jurisdictional facts. (A 103a.) Thus, despite the Rowland Directors' claims that they have disputed the allegations against them (RD Petition at 13 n.10 & 15 n.11), the Bankruptcy Court properly placed little emphasis on Petitioners' meaningless, conclusory affidavits in which they denied wrongdoing or participation in a conspiracy while assiduously avoiding any discussion of the facts of the case.

[9] The Rowland Directors err when they state that the Bankruptcy Court "relied entirely on a brief letter" signed by Rowland and "relied solely on a conference purportedly attended by Hudd" in finding that sufficient facts had been pleaded to exercise jurisdiction over these Petitioners. RD Petition at 12-13. In fact, the Trustees submitted, and the Bankruptcy Court relied upon, detailed allegations contained in the 86-page, 265-paragraph Complaint as well as exhibits attached to various affidavits. Although *one* of the allegations in *one* of the affidavits submitted by the Trustees was later corrected by the affiant, the District Court found that the affiant had confirmed the accuracy of all other facts set forth in the affidavit and that, therefore, the admitted error was "not grounds for discounting [the] remaining declarations." (A 39a n.6.)

2. The District Court

The United States District Court for the District of Idaho granted Petitioners leave to pursue an interlocutory appeal. (A 66a-68a.) On August 16, 1996, the District Court affirmed the Bankruptcy Court's decision, albeit on somewhat different grounds.[10] (A 34a-57a.) The District Court held that jurisdiction over Petitioners existed under the Idaho long-arm statute as to all counts in the Complaint -- including a corporate waste and mismanagement count previously dismissed by the Bankruptcy Court -- other than breach of contract. (A 56a.) Relying on well-settled Ninth Circuit and Idaho precedent to the effect that the exercise of personal jurisdiction under the Idaho long-arm statute is intended to extend to the full limits of due process, the District Court applied the Ninth Circuit's three-pronged due process test in concluding that personal jurisdiction existed over Petitioners. (A 48a.) Crediting the allegations of the Complaint and the affidavits and other submissions of the Trustees -- all of which were uncontroverted -- the District Court correctly concluded (*i*) that Rowland, Hudd and James intentionally directed their actions or aimed their conduct at Idaho such that the purposeful availment prong of the Ninth Circuit's due process test was satisfied;[11] (*ii*) that the acts of these defendants could be attributed to Moran and Inoco as co-conspirators; (*iii*) that but for Petitioners' contacts with Idaho, the claims asserted in the Complaint (other than the claim for breach of contract) would not have arisen; and (*iv*) that the exercise of personal

---

[10] In important *dicta*, the District Court recognized the possibility that jurisdiction might exist over Petitioners pursuant to federal law – in addition to the Idaho long-arm statute – once revised Bankruptcy Rule 7004(f) became effective on December 1, 1996. (A 45a n.9.)

[11] The District Court's application of the well-established "effects" test renders moot Petitioners' protestations that they have "no contact with the State of Idaho" (Inoco Petition at 3) and that none of the commercial transactions described in the Complaint "occurred in Idaho or involved Idaho residents or entities." RD Petition at 9.

jurisdiction over Petitioners in Idaho was, under all the circumstances, reasonable. (A 48a-56a.)

3. The Court of Appeals

Petitioners again sought and obtained leave to appeal. During this time, revised Bankruptcy Rule 7004(f) became effective. Thus, the Trustees advanced before the Court of Appeals no fewer than three separate grounds upon which the decisions of the Bankruptcy Court and the District Court could be affirmed. In addition to providing alternative theories of jurisdiction predicated on the Idaho long-arm statute, the Trustees demonstrated that revised Bankruptcy Rule 7004(f) definitively supported the exercise of personal jurisdiction over Petitioners under federal law. Specifically, the Trustees demonstrated that revised Bankruptcy Rule 7004(f) was expressly amended to permit the exercise of jurisdiction over a foreign defendant "in a civil proceeding arising under the Code or arising in or related to a case under the Code," provided that the exercise of jurisdiction was consistent with due process, based on the defendant's aggregate contacts with the United States as a whole. Because Petitioners had sufficient aggregate contacts with the United States to satisfy due process -- a point the Rowland Directors conceded -- the Trustees argued that the exercise of jurisdiction over them was appropriate under the revised rule.

In an amended opinion issued on January 14, 1998, the Court of Appeals concurred with the Trustees' analysis of the applicability of revised Bankruptcy Rule 7004(f).[12] (A 1a-14a.) As a threshold matter, the Court found the application of the

---

[12] Petitioners mischaracterize the Ninth Circuit's decision, claiming that the Ninth Circuit "[n]o doubt recogniz[ed]" that jurisdiction could not be predicated on the Idaho long-arm statute and therefore limited its analysis to revised Bankruptcy Rule 7004(f). RD Petition at 3; Inoco Petition at 3. In actuality, the Ninth Circuit simply concurred with the Trustees' view that Bankruptcy Rule 7004(f) was dispositive on its face, thereby eliminating the need to review the findings below with respect to the Idaho long-arm statute.

revised rule appropriate, stating that "[p]resent law normally governs in such situations because jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties." (A 10a (quoting *Landgraf v. USA Film Prods.*, 511 U.S. 244, 274 (1994) (internal quotation marks omitted)).) Moreover, the Court of Appeals concluded that the application of revised Bankruptcy Rule 7004(f) to the instant action would be "just and practicable" -- in the words of this Court's Order adopting the revised rule -- because Petitioners' argument that they could not reasonably have expected being haled into court in Idaho was unpersuasive since they had at least to reckon with application of the Idaho long-arm statute to their dealings affecting Idaho creditors. None of the defendants offered facts to show that they would have behaved differently had they expected Rule 7004(f) to apply or that they have been otherwise prejudiced. (A 11a (citing *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957)).)

Applying revised Bankruptcy Rule 7004(f) to the instant case, the Court of Appeals noted that "the Rowland Directors do not contest the constitutional basis for personal jurisdiction" over them but acknowledged that "Inoco contends that it lacked sufficient contacts with the United States." (A 13a.) In holding that jurisdiction could be properly exercised over all Petitioners, however, the Court of Appeals deferred to the findings of fact made by the Bankruptcy Court (and confirmed by the District Court):

> [T]hese alien defendants reached out to Gulf in the United States and forged a continuing relationship with it. The alleged looting of Gulf foreseeably caused Gulf injury in the United States where it was located. . . . [T]he alleged injuries arise out of the defendants' purposeful direction of their activities toward the United States.

(A 13a.)

REASONS FOR DENYING THE PETITIONS

What Petitioners are requesting is for the Court to examine a record already carefully inspected by no fewer than three other federal courts and conclude that the Court of Appeals abused its discretion when it found that it was "just and practicable" -- in the words of this Court's own Order -- to apply Bankruptcy Rule 7004(f) to these facts in upholding the exercise of personal jurisdiction over Petitioners. Because the question presented by Petitioners is concededly one of first impression that has not been decided by any federal court other than the Ninth Circuit, much less created a split among the circuits; because no important question of constitutional interpretation is essential to the outcome of this case and there exist at least two alternative grounds upon which the same substantive result could be reached if this Court were to reverse and remand; and because the Ninth Circuit's decision is fundamentally correct, the petitions for writs of *certiorari* should be denied.[13]

A. The Decision Below Is Not Contrary To Supreme Court Precedent And Does Not Present A Conflict Among The Circuits Requiring This Court's Attention

In its decision affirming the exercise of jurisdiction over Petitioners, the Court of Appeals relied, *inter alia*, on two Supreme Court precedents, *Landgraf* and *McGee*, in finding that the application of revised Bankruptcy Rule 7004(f) to this case comported with due process. (A 10a-11a.) Significantly, in urging the Court to issue writs of *certiorari*, Petitioners fail to allege that either of these precedents was in any way wrongly decided. Rather, Petitioners meekly claim that the Court of Appeals "mechanically appl[ied] dictum" from *Landgraf* in

---

[13] "This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment" below. *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974). Although the Trustees' dispute Petitioners' claim that the Ninth Circuit's opinion was wrongly decided, the petitions should be denied for a variety of additional reasons.

reaching an incorrect conclusion. RD Petition at 18; Inoco Petition at 15.

Petitioners point, however, to no other federal court decision that analyzes similar issues and reaches a different result. In fact, Petitioners concede that this action is the "first and only" time in which the application of revised Bankruptcy Rule 7004(f) has been discussed by any court. *Id.* Contrary to Petitioners' claim that this action "thus is properly before this Court for review," *id.*, it is well-established that such circumstances militate against the issuance of writs of *certiorari*. *See, e.g.*, *McCray v. New York*, 461 U.S. 961, 962-63 (1983) (denying *certiorari*) ("There is presently no conflict of decision with the federal system. . . . [I]t is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court.") (Stevens, J.). For this reason, the petitions should be denied.

B. The Question Presented To This Court By Petitioners Is Not Crucial To The Ultimate Disposition Of This Case, As There Exist Several Separate Non-Constitutional Grounds Upon Which The Same Result Can Be Reached

As noted above, the Trustees offered to the Court of Appeals no fewer than three separate grounds upon which the decisions of the Bankruptcy Court and the District Court could be affirmed. At the Trustees' urging, the Court of Appeals embraced the least complicated of the three theories (without addressing the others) and found Petitioners subject to the jurisdiction of the Bankruptcy Court under federal law (as opposed to under the Idaho long-arm statue).

Petitioners contend that the Court of Appeals abused its discretion in reaching this result. Even if this Court ultimately were to agree with Petitioners, however, and hold that revised Bankruptcy Rule 7004(f) cannot provide the basis for the assertion of personal jurisdiction over them, there remain two distinct state law rationales that would support the exercise of jurisdiction here. As explained in great detail by both the Bankruptcy Court and the District Court, Petitioners are subject

to jurisdiction under the Idaho long-arm statute based on their actions, both in and outside the State of Idaho, which had intended injurious effects in Idaho. (A 48a-56a, 114a-124a, 132a-146a.) In addition, as both the Bankruptcy Court and District Court correctly found, Petitioners are amenable to suit in Idaho under the conspiracy theory of jurisdiction, a well-established doctrine that is consistent with due process. (A 51a-52a, 121a-124a.) Thus, a remand of this action would not dramatically alter the posture of this case, but rather would likely result in affirmance by the Court of Appeals of the decisions below, albeit on different grounds, pursuant to the Idaho long-arm statute.[14]

In the past, this Court has cautioned that "no matter how much [a party] may favor the settlement of an important question of constitutional law, broad considerations of the appropriate exercise of judicial power prevent such determinations unless actually compelled by the litigation before the Court." *Barr v. Matteo*, 355 U.S. 171, 172 (1957) (*per curiam*). Therefore, "Courts should avoid passing on questions of public law even short of constitutionality that are not immediately pressing." *Id.* These words apply with force to the instant action. The decision below does not "actually compel[ ]" this Court's review of the propriety of applying revised Bankruptcy Rule 7004(f) to this case. Because the question presented by Petitioners is not "immediately pressing," the writs should be denied.

---

[14] Regardless of the ground on which jurisdiction is predicated, Petitioners have made it clear that they have no intention of defending this case on the merits. Rather, their strategy all along has been to default, as their counsel informed the Court of Appeal in England last year. *Inoco Plc and Others v. Gulf USA Corp.*, 1995 I No. 781, Court of Appeal (Eng.), Jan. 22, 1997.

C. This Court Is Not In The Practice Of Reviewing Appellate Decisions Where The Alleged Defect Occurred With Respect To A Finding Of Fact

The question presented to this Court by Petitioners is "[w]hether it was just and practicable" for the Court of Appeals to apply revised Bankruptcy Rule 7004(f) to this case. RD Petition at i; Inoco Petition at i. Of course, the fairness and propriety of applying the revised rule to the instant action was the very same issue before the Court of Appeals itself. After a careful review of the record, that court answered this question in the affirmative. Now, Petitioners attempt to persuade this Court to revisit what was, at its core, an exercise of discretion by the Court of Appeals based on a review of the entire record.

It is this Court's longstanding practice "not [to] grant *certiorari* to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925) (Holmes, J.). Moreover, the Court of Appeals based its findings on factual conclusions drawn by the Bankruptcy Court (and confirmed by the District Court) after its initial review of the Complaint and the various affidavits filed in this action. In such circumstances, "this Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts." *Rogers v. Lodge*, 458 U.S. 613, 623 (1982) (citing cases); *see also Branti v. Finkel*, 445 U.S. 507, 512 n.6 (1980) ("In view of our settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the district court and the court of appeals have concurred, we decline to review these and other findings of fact petitioner argues were clearly erroneous."). For this reason alone, the petitions should be denied.

D. The Court Of Appeals Did Not Abuse Its Discretion In Determining That It Was "Just and Practicable" To Apply Revised Bankruptcy Rule 7004(f) To This Pending Case

In addition to the above reasons, each of which compels the denial of the petitions in the instant action, the judgment below was, indeed, quite correctly entered.

In 1993, when Federal Rule of Civil Procedure 4(k)(2) was added to authorize, in a federal question case, extraterritorial service upon a foreign defendant not subject to personal jurisdiction in any state, a corresponding revision to the Bankruptcy Rules was not made at that time, thus creating a (presumably inadvertent) gap between the two sets of provisions. On December 1, 1996, this gap was closed when revised Bankruptcy Rule 7004(f) became effective.[15]

The Order of this Court adopting the revisions to the Bankruptcy Rules stated in the clearest of terms that the revised rule should be applied "insofar as just and practicable [to] all proceedings in bankruptcy cases then pending." (A 181a.) As noted above, the Ninth Circuit found that it was "just and practicable" to apply the revised rule here, because the Petitioners did not "offer facts to show that they would have behaved differently had they expected Rule 7004(f) to apply or that they have been otherwise prejudiced." (A 11a.) Before this Court, Petitioners argue that the Ninth Circuit's holding

---

[15] The legislative history of the revisions to the Bankruptcy Rules makes clear that the new provisions were meant to be remedial in nature and were promulgated merely to conform the Bankruptcy Rules to the updated version of the Federal Rules. As explained in the Committee Note published in connection with the revised Bankruptcy Rules, the "new subdivision (f) . . . clarifies that service . . . in accordance with this rule or the applicable subdivisions of F. R. Civ. P. 4 is sufficient to establish personal jurisdiction over the defendant." 10 Lawrence P. King, *Collier on Bankruptcy* App. 7004 at 7004-39 (15th ed. rev. 1996). In the instant case, Petitioners were all served in England under the Hague Convention.

There is, however, an important distinction between Federal Rule 4(k)(2) and revised Bankruptcy Rule 7004(f). Under the Federal Rule, jurisdiction is only authorized if it comports with Fifth Amendment due process concerns *and* the defendant is not subject to the jurisdiction of the courts of any particular state. In contrast, the Bankruptcy Rule establishes jurisdiction over a foreign defendant in *any* "civil proceeding arising under the Code or arising in or related to a case under the Bankruptcy Code" and *regardless* of whether the defendant is also subject to the jurisdiction of any particular state. The fact that Petitioners may also be subject to jurisdiction under the Idaho long-arm statute is thus, in a word, irrelevant under Bankruptcy Rule 7004(f).

> overlooks the fact that amended Bankruptcy Rule 7004(f) did not exist at the time factual evidence was submitted to the Bankruptcy Court, so Petitioners never had the opportunity to submit any evidence relating to the applicability of the amended Rule or its effects on Petitioners' conduct.

RD Petition at 17; *see also* Inoco Petition at 18. The Court of Appeals, however, considered and rebuffed this argument, recognizing that Petitioners can make no credible claim that the existence of Bankruptcy Rule 7004(f) between 1989 and 1991 (during Petitioners' stewardship of Gulf) -- much less in 1994, when this action was commenced -- would have caused them to behave differently:

> It is difficult to see how Rule 7004(f) might have induced [Petitioners] into behavior that the long-arm statute did not. The argument, in any event, is not persuasive in light of their failure to give any indication in their briefs or petitions [as to] what facts they might have offered for this purpose.

(A 11a n.2.)

Petitioners consistently refer to the application of revised Bankruptcy Rule 7004(f) to this case as "retroactive," as if their invocation of that word should alone automatically decide the matter in their favor. There is, however, nothing "retroactive" about the application of the revised rule to the instant action, and Petitioners' claim that the Ninth Circuit "has effectively created jurisdiction over [them] where none previously existed" is completely misguided. RD Petition at 3; Inoco Petition at 3-4. First, as previously determined by the Ninth Circuit, the presumption against retroactivity in certain circumstances "generally does not apply to rules conferring or withdrawing jurisdiction." *Arrowhead Estates Dev. Co. v. United States Trustee* (*In re Arrowhead Estates Dev. Co.*), 42 F.3d 1306, 1311 (9th Cir. 1994) (citing *Landgraf*). Further, in direct contrast to Petitioners' claim that the "application of the new Rule to this

case would alter [their] rights" (RD Petition at 18; *see also* Inoco Petition 16), this Court has held that "statutes affecting jurisdiction speak to the power of the court rather than to the rights or obligations of the parties." *Republic Nat'l Bank v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring). Therefore, because a court that exercises expanded jurisdiction does *not* burden parties with new consequences to previous actions, the exercise of such power does not implicate "retroactivity" concerns. *See McGee*, 355 U.S. at 224 (holding that an amendment to a long-arm statute "neither enlarged nor impaired respondent's substantive rights or obligations").

In any event, application of Bankruptcy Rule 7004(f) to this case provided an *additional*, rather than the exclusive, basis for upholding jurisdiction over Petitioners. Far from "creating jurisdiction over [them] where none previously existed," the Court of Appeals simply affirmed that, no matter how you analyze the facts -- under the Idaho long-arm statute or under revised Bankruptcy Rule 7004(f) -- Petitioners may be held accountable for their misdeeds, which adversely affected the lives of thousands of Idaho residents, in the Bankruptcy Court.

CONCLUSION

For all of the above-stated reasons, the petitions for writs of *certiorari* should be denied.

Dated: May 12, 1998

Respectfully submitted,
Richard W. Reinthaler*
Janis M. Meyer
Richard B. Sypher
Dianne Coffino
Brett T. Goodman
Dewey Ballantine LLP
1301 Avenue of the Americas
New York, New York 10019-6092
(212) 259-8000

and

Terry L. Myers
Ramona S. Neal
Givens Pursley LLP
Suite 200, Park Place
277 North Sixth Street
Boise, Idaho 83701
(202) 342-6571

Attorneys for Respondents
Bernard Goodson, Ford Elsaesser, Lowell Finley and Jay J. Miller, as Trustees

*Counsel of Record